Supreme Court, U.S.
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No. 91-949

In The

Supreme Court of the United States

October Term, 1991

HOLLAENDER MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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1. In its Brief in Opposition, Respondent has made its position absolutely clear. It adheres to *Franks Bros. Co. v NLRB*, 321 U.S. 702 (1944). Once an employer unlawfully withdraws recognition from an incumbent union, a remedial bargaining order *must* issue, irrespective of the passage of time, irrespective of the wishes of the uncoerced majority of its employees, irrespective of any changed circumstances whatsoever. When weighed against the union's interest in stable bargaining relations, the uncoerced desire of employees to be free of union representation is given little, if any, consideration.[1]

Franks makes for good law where an employer commits coercive independent unfair labor practices which cause the anti-union disaffection in the first place. In such cases, the employer should not be permitted to benefit by its own misconduct. But here, Petitioner did not commit such unfair labor practices. The 16 employees who manifested their anti-union sentiment did so prior to and independent of Petitioner's unlawful withdrawal of recognition.

There is also some merit in forcing the maintenance of the bargaining relationship in the wake of an unlawful withdrawal of recognition where the pro-union

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[1] The maintenance of stable bargaining relationships was also echoed by the Supreme Court in *Fall River Dyeing and Finishing Corp. v NLRB*, 482 U.S. 27 (1987) and *NLRB v Burns International Security Services, Inc.*, 406 U.S. 272 (1972). Resp. 9. However, these cases addressed facts and issues far different from those present here. Neither *Fall River* nor *Burns* faced the issue of employees expressing their desire not to be represented by a union.

employees were "replaced by new employees in the normal course of business." 321 U.S. at 703. Resp. 8. However, unlike "replacement employees," whose union views may be unknown or ambiguous, the solid nucleus of 16 employees in the instant case soundly rejected union representation prior to any withdrawal of recognition. More importantly, these 16 anti-union employees remained anti-union as the entire employee complement grew smaller. Within hours of the employer's refusal to bargain on May 8, 1992[2], the 16 anti-union employees became 50% of the workforce. Within a few weeks thereafter, this group of 16 became a clear anti-union majority within the workforce.

2. Respondent's attempt to distinguish the circuit court cases contrary to its position,[3] is not convincing. Respondent contrasts the several year time gap between the refusal to bargain and the Court's order in those cases with the instant case, where "only" two-and-three-quarter years have elapsed since the date the Respondent withdrew recognition in May of 1989. However, in judging whether union support amongst employees has effectively dissipated over time, there is little qualitative difference between a two-and-three-quarters and a six-year time lapse.

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[2] Two probationary employees quit their employment at the end of the very business day in which the refusal to bargain took place.

[3] *People's Gas System v NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *St. Agnes Medical Center v NLRB*, 871 F.2d 137 (D.C. Cir. 1989); *NLRB v Laverdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991); *Texas Petrochemicals Corp. v NLRB*, 923 F.2d 398 (5th Cir. 1991).

Furthermore, the passage of time was only one factor relied upon by the circuit courts in these cases, and hardly the determining one. Respondent has glossed over the extended discussion by the circuit courts in these cases as to the need to balance institutional interests of the unions in the stability of bargaining relationships against the fundamental right of employees, as guaranteed by Section 7 of the National Labor Relations Act, to exercise free choice as to union representation. The employees' anti-union sentiment in this case was no less vigorous and unmistakable than that of the employees in these other cases. Employees can express their wishes to be free of union representation equally through decertification elections or uncoerced anti-union petitions.

3. Respondent minimizes the nucleus of 16 anti-union employees which ultimately became an anti-union majority by arguing that their disaffection from the union was caused, or at least perpetuated, by Petitioner's handout to its employees on noon of May 9, 1989, the day *after* the Petitioner's withdrawal of recognition from the union, and several days *after* the 16 employees voiced their uncoerced desire to be free of union representation.

Respondent cites the reasoning of its own Administrative Law Judge that

> [i]t cannot be presumed that none of the petition-signers would have undergone a change of heart if, instead of promising employees "a new salary package" (on expiration of the existing contract) as what [petitioner] termed a "consequence" of [its] unlawful refusal to enter into a negotiation for a successor contract, [petitioner] had offered the union that same "package" as

> part of such a contract. . . . There is no basis for petitioner's naked assertion that its unlawful withdrawal of recognition bore no relationship to any manifestation of majority sentiment against representation by the union after May 8, 1989.

Resp. 10.

There are several flaws in Respondent's argument:

A. First and foremost, it is pure conjecture. Respondent appears to be saying that if only Petitioner had continued to bargain with the union and implemented a salary and fringe benefit package as part of the union contract, all or most of the anti-union petition signers may have had a "change of heart" and supported the union. However, the 16 employees affixed their signatures to the anti-union petition *prior to* the withdrawal of recognition and circulation of the handout precisely because they did *not* want to be represented by the union for collective bargaining purposes and did *not* want the union to negotiate another contract on their behalf. The Respondent can cite no factual predicate whatsoever in this record to indicate that employees would have suddenly switched allegiance to the union had Petitioner signed a contract with the union. Equally speculative is Respondent's reasoning that those employees who did not sign the anti-union petition and ultimately left the employment of Petitioner "may have" been influenced by the Petitioner's earlier withdrawal of recognition from the union. Resp. 7, n.2.

B. Even if the May 9 handout had an effect on the employees generally, it could not possibly have had a detrimental effect on the two probationary employees

who quit mere hours after Petitioner informed the union on the afternoon of May 8, 1989 that it was withdrawing recognition. Since the union no longer commanded a majority of bargaining unit employees as of the end of the workday on May 8, the distribution of the handout on May 9 had no effect whatsoever on the union's non-majority status.

C. There is nothing improper in the distribution of the handout anyway. The bargaining unit employees were naturally confused as to the status of the union and union negotiations. Petitioner had every reason to advise employees of the withdrawal of recognition, and how it would impact their terms and conditions of employment. Advising employees that after the expiration of a contract there would no longer be a wage deduction for union dues was indeed a factual statement.[4] It was also a legitimate personnel practice for Petitioner to advise employees that they would not lose any of their current salary and fringe benefits and that a new salary and fringe benefit package would ultimately be implemented. Nor was it an error for the Petitioner to thank its employees for their patience and support. Petitioner did not berate the union or its supporters. Petitioner did not selectively praise only those employees who signed the anti-union petition but rather all of the employees for bearing up under the uncertainty. To not so communicate

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[4] The Respondent has held that dues checkoff and union security provisions do not survive the expiration of a collective bargaining agreement. See, *e.g., Robbins Door and Sash Co.*, 260 NLRB 659 (1982); *Peerless Roofing Co.*, 247 NLRB 500 (1980).

with the employees under these unusual circumstances would have been foolhardy.

D. Respondent's reference to the May 9 handout as coercing employees in their free choice is most disturbing. Respondent has cited no authority that the handout was improper or coercive. Indeed, it was never the subject of an unfair labor practice charge or complaint. Its legality was never litigated in an unfair labor practice proceeding. Hence, it is altogether improper for Respondent to argue now the coerciveness of the handout.

Therefore, for all these reasons, the May 9 handout provides no causal link between the Petitioner's withdrawal of recognition from the union, and the employees' disaffection with the union.

4. This case presents a fundamental clash between two conflicting and equally legitimate interests: (1) the stability of bargaining relationships, and (2) the right of employees to freely choose whether they desire union representation. However, Respondent views the interest of stable bargaining relations as "overriding policy". Resp. 9. Respondent's position is absolute, static and mechanistic. Once an employer withdraws recognition from the union, the Respondent puts on blinders, ignores all of the circumstances which take place thereafter and reflexively issues a bargaining order. The uncoerced feelings of the employees are of little moment. This is hardly the effectuation of the National Labor Relations Act which has traditionally regarded the exercise of employee free choice as paramount.

Franks is almost 50 years old. It is perhaps time for this Court to re-examine *Franks* in light of *Garment Workers v NLRB*, 366 U.S. 731 (1961) and redefine or clarify the extent to which Respondent's overriding interest in the stability of industrial relations should more fully accommodate the right of employees to choose or reject union representation. Such review is especially timely since several circuit courts have differed markedly in their recent attempts to reconcile these two competing interests.

This case presents an ideal vehicle for the Court to redress this balance.

Respectfully submitted,

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